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In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM FRENCH SMITH, ET AL., PETITIONERS

v.

THE BLACK PANTHER PARTY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

In a *Bivens* suit seeking $100 million in damages from numerous former high-ranking federal officials and alleging a decade-long, nationwide conspiracy:

1. Whether the district court properly entered summary judgment in favor of certain officials because (a) the complaint contained no specific factual allegations concerning them and few, if any, such allegations concerning events occurring during their terms of office, (b) they submitted affidavits evidencing that they were not involved in the alleged conspiracy, and (c) plaintiffs failed to adduce any contrary proof despite the opportunity to take discovery for nearly one year after the summary judgment motion was filed.

2. Whether plaintiffs' remaining claims were properly dismissed for refusing to comply with the district court's order compelling discovery vital to the defense.

PARTIES TO THE PROCEEDING

The appellants in the court of appeals were The Black Panther Party, Huey P. Newton, Donald Freed, Berton Schneider, Thomas and Flora Gladwin, John George, Earl Neil, and John and Elizabeth Huggins.

The appellees in their individual capacities were Edward Levi, Griffin Bell, W. Michael Blumenthal, Clifford Alexander, Stansfield Turner, Benjamin F. Bailar, George Bush, William E. Simon, William E. Williams, John Mitchell, Robert Mardian, Clarence M. Kelley, William C. Sullivan (deceased), George C. Moore, William E. Colby, Richard Helms, Rex Davis, Harold A. Serr, Donald C. Alexander, Johnnie M. Walters, Randolph W. Thrower, Howard H. Calloway, Harold R. Aaron (deceased), Winton M. Blount, and Tom Charles Houston. In addition, the incumbent Attorney General, Director of the Federal Bureau of Investigation, Secretary of the Treasury, Director of the Bureau of Alcohol, Tobacco and Firearms, Commissioner of Internal Revenue, and Postmaster General were appellees in their official capacities.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Attorney General William French Smith and the other petitioners represented by the Department of Justice,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-112a) is reported at 661 F.2d 1243. The opinions of the district court (Apps. F, G, H, *infra*, 117a-131a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1981, and petitions for rehearing were denied on September 14, 1981 (App. C, *infra*, 114a). On December 10, 1981, the Chief Justice granted an extension of time within which to file a petition for a writ of certiorari to

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[1] Those petitioners are listed in notes 3-7, *infra*.

and including February 11, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondents—the Black Panther Party; its founder, Huey Newton; and several Party supporters—filed suit in the United States District Court for the District of Columbia, alleging the existence of a nationwide conspiracy begun in 1967 and dedicated to the destruction of the Party through illegal means.[2] Seeking more than $100 million in compensatory and punitive damages, as well as injunctive and declaratory relief, respondents' complaint, as subsequently amended, named as defendants in their individual capacities 23 former high-ranking government officials, including three former Attorneys General,[3] two former Secretaries of the Treasury,[4] four former Directors of Central Intelligence,[5] two former Secretaries of the

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[2] Alleged government actions claimed to be part of this conspiracy ranged from COINTELPRO (an FBI counterintelligence program) and the so-called "White House Enemies List" of the Nixon Administration, to specific activities supposedly directed at the Party and its members, such as harassment of Party members and supporters by unlawful mail openings, electronic and physical surveillance, unlawful entries and searches, federal assistance to local police in committing raids on offices and homes of Party members, killings of various Party members, using operatives and informants to incite violence within the Party, circulating a "comic book" that damaged the Party's reputation, causing street vendors of the Party's newspaper to be arrested by local police, and arrests and tax audits of Newton (see App. I, *infra*, 143a-157a). A principal defense in this case is that any government actions directed against the Party were part of a legitimate effort to investigate and enforce the laws against an organization that was engaged in "a conspiracy to cause civil disorder * * * by unlawful intimidation, force, violence, terrorist activities and inducements to kidnapping, murder and interference with law enforcement officers in the lawful performance of their official duties" (App. A, *infra*, 86a).

[3] Griffin Bell, Edward Levi, and John Mitchell.

[4] W. Michael Blumenthal and William E. Simon.

[5] Stansfield Turner, George Bush, William E. Colby, and Richard Helms.

Army,[6] and two former Postmasters General.[7] Named as defendants in their official capacities were the present Attorney General; Director of the Federal Bureau of Investigation; Director of Central Intelligence; Secretary of the Treasury; Director of the Bureau of Alcohol, Tobacco and Firearms; Commissioner of Internal Revenue; Secretary of the Army; and Postmaster General.

2. Respondents filed their initial complaint in December 1976. Three months later, they amended their complaint to add as defendants several newly-appointed members of the Carter Administration, including Attorney General Bell, Secretary of the Treasury Blumenthal, Secretary of the Army Alexander, and CIA Director Turner. Although these officials were made defendants in their individual as well as their official capacities, no new substantive allegations were added by the amended complaint. Indeed, not only did every dated event alleged in the complaint (with one arguable exception) occur prior to the new defendants' terms of office,[8] but every such event (with two

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[6] Clifford Alexander and Howard H. Calloway.

[7] Benjamin F. Bailar and Winton M. Blount.

The remaining petitioners sued in their individual capacities are former Assistant Attorney General Robert Mardian, former Director of the FBI Clarence M. Kelley, former Directors of the Bureau of Alcohol, Tobacco and Firearms Rex Davis and Harold Serr, former Commissioners of Internal Revenue Donald C. Alexander, Johnnie M. Walters and Randolph W. Thrower and former Acting Commissioner William E. Williams, former Assistant Chief of Staff for Army Intelligence Harold R. Aaron (deceased), and former Assistant to the President Thomas Charles Huston (App. A, *infra*, 5a n.12).

George C. Moore, a former FBI official, was also sued in his individual capacity. Moore is represented by separate counsel and has filed a petition for a writ of certiorari (No. 81-774 (filed Oct. 22, 1981)). William C. Sullivan, now deceased, was also sued in his individual capacity.

[8] The only specific allegation in the amended complaint that could arguably apply to these officials is the assertion that "FBI agents still take down the names and license numbers of guests who visit

minor exceptions) antedated the *previous* administration as well.[9] In both complaints, respondents conceded that they lacked specific information about the nature and scope of the conspiracy but expressed the hope of obtaining such information through discovery (see App. A, *infra*, 6a; App. I, *infra*, 144a). In both complaints, respondents also admitted that they did not know what each petitioner had done, but asserted that "there is no doubt that all" were responsible for something (*id.* at 145a). The few details in the complaints were largely drawn from a 1976 Senate Committee report concerning an FBI counterintelligence program (code-named COINTELPRO) discontinued in 1971 (App. A, *infra*, 6a, 78a).

The individual petitioners promptly moved to dismiss the amended complaint for failure to include any specific factual allegations of individual wrongdoing, but the district court denied the motion. A short time later, those petitioners who took office after January 1, 1974 (hereinafter "the post-1973 petitioners")[10] moved for summary judgment and submitted affidavits attesting to their lack

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the residence of plaintiff Elaine Brown" (App. I, *infra*, 145a). That allegation appeared verbatim in the original complaint filed in December 1976. Moreover, as the court of appeals noted, such surveillance is "not necessarily unlawful" (App. A, *infra*, 73a). In addition, Elaine Brown voluntarily dismissed her claims after petitioners noticed her deposition.

[9] The first exception is described in note 8, *supra*. The second is the allegation that in 1976 the FBI paid "over $7 million" to "informants and provacateurs" (*sic*) (App. I, *infra*, 143a). Payments to informants, however, are not in themselves illegal. Furthermore, the Senate Report from which respondents admittedly took the figure $7 million (see App. I, *infra*, 143a) stated only that the FBI's budget for Fiscal Year 1976 included an appropriation of approximately that sum for all of its 1,500 domestic intelligence informants, not that any specific sum was expended in connection with respondents (S. Rep. No. 94-755, 94th Cong., 2d Sess. 269 (1976)).

[10] The post-1973 petitioners are Bell, Blumenthal, Clifford Alexander, Turner, Bailar, Levi, Simon, Williams, and Bush.

of involvement in any conspiracy against the Party and to their good faith in all actions affecting the respondents (App. A, *infra*, 9a).

In September 1977—nine months after filing suit—respondents replied to the summary judgment motion by filing an affidavit of counsel asserting that discovery was needed before any facts could be presented justifying opposition to the motion. See Fed. R. Civ. P. 56(f). Respondents did not specify the discovery that would be required or when they contemplated initiating it. On the strength of that affidavit, the district court deferred action on the summary judgment motion for nearly 11 months (App. A, *infra*, 9a-10a).

Finally, in July 1978, the district court granted summary judgment in favor of the post-1973 petitioners. The court noted that respondents had not pleaded any "specific factual, nonconclusory allegations" against the post-1973 petitioners; that the post-1973 petitioners had "properly supported" their motion with affidavits "evidenc[ing] their lack of involvement in the general acts which were alleged";[11] and that respondents had made no evidentiary showing in opposition to the motion although they "had ample opportunity to take * * * discovery and have taken discovery" (App. H, *infra*, 130a-131a).

3. Meanwhile, petitioners had begun their own discovery by serving interrogatories and document requests on the Party and Newton. Petitioners sought specific information concerning the general allegations in the amended complaint and called upon respondents to identify witnesses with information pertinent to their allegations. The Party and Newton simply ignored these discovery requests. Only after petitioners moved for imposition of sanctions under Fed. R. Civ. P. 37(d) did the respondents

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[11] The district court also noted that the post-1973 petitioners' evidentiary submission "was substantiated by the recency of their respective * * * terms of offices which did generally not coincide with specific acts alleged in the Amended Complaint" (App. H, *infra*, 130a).

serve answers and objections to petitioners' interrogatories. The Party's designated representative claimed to lack the information required to provide full answers to more than 100 of petitioners' 244 interrogatories (App. G, *infra*, 124a-126a). The Party objected to other interrogatories as unduly burdensome and responded to some simply by referring to unspecified issues of the Party's newspaper, *The Black Panther* (App. F, *infra*, 118a; App. G, *infra*, 124a, 126a). The Party refused to answer several interrogatories, claiming a First Amendment privilege to conceal the identities of all rank-and-file party members and those Party leaders not already known to the public (App. F, *infra*, 119a-121a; App. G, *infra*, 125a). Similarly, Newton refused to answer about 40% of the interrogatories on Fifth Amendment grounds (App. F, *infra*, 120a-121a; App. G, *infra*, 127a-128a). After receiving these responses, petitioners renewed their motion to dismiss the complaint under Rule 37(d) for failure to comply with discovery. Petitioners pointed out that respondents' objections were untimely, that many of their responses were evasive and incomplete, and that several of their answers actually contradicted information they had previously furnished (App. A, *infra*, 11a-13a).[12]

The district court again denied petitioners' motion to dismiss but permitted them to file a motion to compel discovery under Fed. R. Civ. P. 37(a). Petitioners did so, and on August 6, 1979, their motion was granted in most respects (App. G, *infra*, 123a-129a).

The district court first addressed the problem of the large number of interrogatories—nearly one-half the total—that the Party's chosen representative had been unable to answer fully (App. G, *infra*, 124a-126a). The Party had claimed, on the one hand, that it was entitled to designate whomever it wished to respond to the inter-

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[12] That information had been supplied by the Party in *David Dellinger, et al.* v. *John N. Mitchell, et al.*, Civil Action No. 1768-69 (D.D.C.), through its then-Chairperson, Elaine Brown.

rogatories and, on the other hand, that its designated representative was "not able to respond fully" "because of inexperience, or otherwise" (*id.* at 125a).[13] The court noted that respondents had "either lost or destroyed virtually all of the relevant documents" (*id.* at 123a) and that "plaintiffs [were] * * * requesting damages from past officials" who were consequently "forced to rely on

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[13] At this point, the district court was confronted with what it described as a "chao[tic]" discovery situation. (C.A. App. 626; "C.A. App." refers to the appendix in the court of appeals. For example, the Party's responses to interrogatories calling for the identification of its leaders—persons who would be principal sources of witnesses—were evasive and contradictory. Although the Party had identified only four officers in response to a similar interrogatory in the *Dellinger* litigation (C.A. App. 677, the Party now claimed that it "[was] and always [had] been governed by a fifteen-member body known as the Central Committee" (C.A. App. 93). In addition, the Party refused to provide the identities of all Central Committee members, on the ground that the identities of those members whose association with the Party was not publicly known were privileged under the First Amendment. Moreover, a comparison of the Party's answers in the *Dellinger* discovery, its answers to petitioner Moore's discovery, and its answers to interrogatories served by petitioners in this case contained contradictions concerning which Party leaders' identities had been publicly disclosed (C.A. App. 534-536).

This already confusing discovery situation became even more chaotic when petitioners acquired a transcript of Newton's March 1979 testimony in a criminal proceeding in California. The transcript disclosed that Newton had already testified about many of the matters that were the subjects of his Fifth Amendment claims. It also showed that Newton had testified that by October 1977 "the Central Committee of the Party [had been] dissolved" and that he was the only remaining Party officer (C.A. App. 824). Not only was this testimony irreconcilable with the interrogatory answers provided by respondents in this case, it suggested that the Party had not acted in good faith in refusing on First Amendment grounds to reveal the identities of non-existent officers.

memories" for "information * * * pertinent to their defense of a potentially complex lawsuit" (*id.* at 123a-124a). Accordingly, the court ordered Party leaders to review the interrogatories in question and to "provide under oath whatever information each has" (*id.* at 126a).[14]

The district court then turned to the numerous interrogatories that respondents had answered simply by referring to "unspecified issues" of the Party newspaper (App. G, *infra*, 126a). In reply to petitioners' request for more detailed answers, the Party had stated that *The Black Panther* was a public record, that the Party itself had not kept copies of all issues and therefore, in effect, that petitioners themselves should look up whatever information they desired (*ibid.*). Finding that suggestion unacceptable, the court ordered the Party to file further responses "based upon a full and complete review of the [Party's] publication" (*id.* at 127a).

The district court rejected the claims of privilege asserted by the Party and Newton, noting that the information sought was "vital" to the defense (App. G, *infra*, 125a, 127a-128a). And the court ordered the Party to submit "[f]urther answers explaining inconsistencies" in its answers to 44 interrogatories (*id.* at 124a). The Party and Newton were given 60 days in which to comply.

Both the Party and Newton disobeyed the district court's order in large measure. The Party expressly refused to have its officers respond individually (App. F, *infra*, 118a). Instead, it designated a new representative

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[14] The Party's first designated representative did not become a member of the Party's Central Committee until 1971. Since most of the allegations in the amended complaint concerned the period prior to 1971, she apparently lacked personal knowledge concerning most of the matters at issue (see App. A, *infra*, 82a (MacKinnon, J., dissenting)).

(who had not joined the Party until 1972),[15] and the new representative submitted supplemental responses to only 32 of the 107 interrogatories that the Party officers had been ordered to answer (C.A. App. 860). In addition, she filed supplemental answers to only 16 of the 44 interrogatories with respect to which the court had ordered clarification (App. F, *infra*, 118a). Moreover, as the court later observed, those responses "not only * * * fail[ed] to clarify previous answers, they create[d] further confusion" (*ibid.*). The Party also refused to provide answers to three of the four interrogatories with respect to which it had previously claimed a First Amendment privilege (*id.* at 119a-120a). The Party acknowledged that its response did not comply "with the 'letter' " of the district court's order (C.A. App. 861). Newton responded to the court's order one month late (C.A. App. 991-994), and he continued to refuse to answer 30 interrogatories on Fifth Amendment grounds (App. A, *infra*, 18a, 90a; C.A. App. 991-994).

After receiving respondents' replies, petitioners once again moved for dismissal of the complaint, and this time the motion was granted (App. E, *infra*, 116a). Noting respondents' failure to provide supplemental answers clarifying previous inconsistencies, their failure to submit individual responses by Party officers, and their continued refusal to answer certain interrogatories on grounds of privilege (App. F, *infra*, 118a-121a), the court concluded that respondents' "conscious disregard" of the order compelling discovery necessitated the sanction of dismissal (*id.* at 122a).[16]

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[15] In addition, she did not become a member of the Party's "Central Committee" until 1979—two years after its abolition, according to Newton's earlier testimony (C.A. App. 872).

[16] The court initially dismissed the complaint only with respect to the Party and Newton (App. E, *infra*, 116a) but later ordered dismissal with respect to all the remaining plaintiffs, whose claims were dependent upon the Party's (App. D, *infra*, 115a).

4. The court of appeals reversed both the entry of summary judgment in favor of the post-1973 petitioners and the dismissal of the complaint for willful disobedience of the order compelling discovery (App. A, *infra*, 1a-112a).

In an opinion written by Judge Wright and joined by Judge Ginsburg, the court of appeals held that the entry of summary judgment had been premature. Recognizing that "[a]lmost all of the activities described in the complaint were alleged to have occurred before 1974," the court voiced some skepticism that respondents would "be able to uncover any evidence implicating" the post-1973 petitioners (App. A, *infra*, 73a). Nonetheless, the court stated that respondents "should be given an opportunity" for "further discovery" in their attempt to link the post-1973 petitioners to the alleged conspiracy (*ibid.*).

The court of appeals also reversed the dismissal of the complaint (App. A, *infra*, 1a-67a). Addressing each portion of the order compelling discovery that respondents had disobeyed, the court concluded either that respondents' disobedience had been justified or that they had substantially complied with the district court's directives (see *id.* at 24a). The majority held that the district court had erred in ordering individual responses from Party officers (*id.* at 25a-31a). Before requiring such responses, the majority stated, the Party's designated representative had to be given another chance to supply adequate answers (*ibid.*). The majority next held that "the District Court [had erred in ruling] that the [Party's] supplemental responses did not provide sufficient clarification" (*id.* at 32a). In overruling the district court on this factual issue, the majority relied on statements of fact contained in legal memoranda (see *id.* at 38a nn.122, 124; 40a nn.129, 131; 41a n.134). Finally, the majority held that respondents' refusal to answer certain interrogatories on grounds of privilege did not warrant dismissal of the complaint because the record did not disclose whether the district court had applied the correct legal principles in rejecting respondents' claim (*id.* at 41a-64a).

Judge MacKinnon dissented in part (App. A, *infra*, 78a-97a). Although he agreed that "dismissal, at the present stage of the case, was too harsh a sanction," he dissented from the majority's "half-hearted approval of the Party's refusal to supply certain critical information" (*id* at 79a). Judge MacKinnon saw no defect in the order requiring individual responses from Party officers (*id.* at 79a-83a),[17] and he concluded that the district court had applied the correct legal principles and had reached the correct result in rejecting the claims of privilege asserted by Newton and the Party (*id.* at 83a-97a).

REASONS FOR GRANTING THE PETITION

This case concerns an important and growing problem arising from this Court's decisions in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and *Butz* v. *Economou*, 438 U.S. 478 (1978).

In *Bivens*, this Court held that the Constitution itself provides a federal cause of action for damages on behalf of plaintiffs alleging violations of their constitutional rights. Since then the number of *Bivens* suits has multiplied at an astounding rate. There are now more than 2,000 constitutional damages actions pending against federal officials, and 50 to 60 are added each month. Many, like this case, involve numerous defendants and vague allegations of collective, rather than specific individual, wrongdoing.

In *Economou*, this Court held that high-ranking federal officials are generally entitled to only a qualified, rather than an absolute, immunity from damages liability in *Bivens* actions based upon performance of their official

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[17] The Appendix to Judge MacKinnon's opinion (App. A, *infra*, 98a-112a) contains a "sampling" of 26 of the interrogatories that were propounded to the Party and of the Party's responses to them. Judge MacKinnon pointed out the inadequacies of the Party's responses and petitioners' need for the further discovery ordered by the district court.

duties. Responding to the argument that absolute immunity was needed to prevent harassment through frivolous lawsuits and obstructionist litigation tactics, the Court stated that "[i]nsubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading" and that "damages suits concerning constitutional violations * * * can be terminated on a properly supported motion for summary judgment" (438 U.S. at 507-508). The Court added: "In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits" (*ibid.*). See also *Hanrahan* v. *Hampton*, 446 U.S. 754, 765 (1980) (Powell, J., dissenting in part).

The instant case exemplifies the explosion of "litigation in which constitutional claims easily are asserted" (*Hanrahan* v. *Hampton*, *supra*, 446 U.S. at 765 (Powell, J., dissenting in part)) and confirms the wisdom of the admonition that such cases require "firm application of the Federal Rules of Civil Procedure" (*Butz* v. *Economou*, *supra*, 438 U.S. at 508). The 28-page amended complaint filed by respondents against more than 20 former high-ranking government officials contains 72 paragraphs, many with multiple subparagraphs, and employs only the most general terms in charging petitioners with responsibility for hundreds of supposedly unlawful government actions occurring over a course of more than a decade. The allegations in just one subparagraph of the amended complaint are identical to the claim in *Hanrahan* v. *Hampton*, *supra*, which was "said to have [produced] 'the longest case tried to a jury in the history of the United States Judiciary'" (446 U.S. at 760 (Powell, J., dissenting in part)). Justice Powell's observation in *Hanrahan* is thus even more fitting here: "this is not ordinary litigation" (*id.* at 763). The "extraordinary magnitude of the litigation and * * * [its] 'overtones of unbridled denigrating attacks on government officials' * * * imposed a special

duty on the courts to bear in mind the admonition of *Butz* v. *Economou*" (*id.* at 763-764).[18]

Heeding that admonition, the district court applied the Federal Rules of Civil Procedure firmly but fairly and, in so doing, first granted summary judgment in favor of some petitioners and ultimately dismissed the complaint in its entirety. After allowing respondents more than one year to conduct discovery, the court granted the post-1973 petitioners' properly supported motion for summary judgment because respondents had failed to adduce *any* evidence substantiating their vague allegations against those individuals. The court then sought to prevent abuse of the discovery process. It observed that "the paperwork in this case to date is unbelievable. We have five full volumes and we haven't come close to reaching the issues" (C.A. App. 626). Respondents first ignored petitioners' discovery requests and then, when petitioners moved for imposition of sanctions, supplied incomplete, conflicting, and evasive answers. After refusing to dismiss the complaint and after months of briefing and argument, the court drafted an order compelling discov-

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[18] This is only one of a number of similar and related cases in which claims made by the Black Panther Party and its members concerning a high-level government conspiracy have become mired in pretrial proceedings. In *The Black Panther Party, et al.* v. *Donald C. Alexander, et al.*, Civil Action No. C-74-1247 AJZ (N.D. Cal.) the complaint was dismissed after two years for lack of prosecution. In *David Dellinger, et al.* v. *John N. Mitchell, et al.*, Civil Action No. 1768-69 (D.D.C. (filed June 26, 1969)), the plaintiffs' claims were dismissed for failure to comply with discovery orders after ten years of litigation. Most recently, in *Hampton* v. *Hanrahan*, 522 F.Supp. 140 (N.D. Ill. 1981), the plaintiffs have been granted permission to amend their complaint to add various additional former federal officials as defendants. The district court conditioned its order allowing this amendment on the plaintiffs' ability and willingness to redraft the proposed complaint, which the court characterized as a "rambling, conclusory * * * and confusing narrative, replete with characterizations, conclusions and personalities" (*id.* at 146, 150).

ery that was designed to ensure that petitioners would obtain information "pertinent" and "vital" to their defense. When respondents "conscious[ly] disregard[ed]" (App. F, *infra*, 122a) that order and continued to "frustrat[e] the discovery process" (*ibid.*), the district court concluded that dismissal of their claims was appropriate.

In reversing the district court's decision, the court of appeals stood this Court's admonition in *Economou* on its head. Instead of ensuring through "firm application of the Federal Rules of Civil Procedure" (438 U.S. at 508) that former and present government officials were not subjected to harassment by means of litigation, the court of appeals applied those rules to respondents in the most lenient, forgiving manner. It ignored, pardoned, or explained away all of their procedural defaults. By contrast, it read the rules in a cramped, hypertechnical fashion in judging the efforts of the trial court to bring this massive, protracted litigation under control.

Review by this Court is required both because reinstatement of this case is inconsistent with the approach suggested in *Economou* and because of the message the court of appeals' decision will inevitably convey to district judges before whom similar cases are now pending. If the decision of the court of appeals is permitted to stand, it will vindicate the warning of the dissenters in *Economou* that the Court's confidence in the lower courts' willingness to "weed out insubstantial claims * * * show[ed] more optimism than prescience" (438 U.S. at 527 (Rehnquist, J., dissenting)). The court of appeals' second-guessing of the district court on matters of pretrial procedure peculiarly within a trial court's competence and discretion would be erroneous even if this were not a *Bivens* action. But in light of the special nature of this suit, an exercise of this Court's "power of supervision" (Sup. Ct. R. 17.1(a)) seems particularly appropriate.

1. Perhaps the most blatant illustration of the court of appeals' mistaken approach is the reversal of the entry of summary judgment in favor of the petitioners who

took office after January 1, 1974. Respondents' complaint contained *no* specific factual allegations concerning these individuals. Indeed, the complaint, when read in the most generous light, mentions only one event that might have occurred during the Carter Administration, and the activity described—FBI street surveillance—is not in itself illegal. The complaint mentions only one additional event occurring during the Ford Administration—payments to informants. Such payments, of course, are also not in themselves illegal. Finally, the complaint mentions only one additional specific event that occurred at any time after 1973 (App. I, *infra*, 146a).

In light of these deficiencies, respondents' claims against all or most of the post-1973 petitioners might well have been dismissed immediately for failure to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief" (Fed. R. Civ. P. 8(a)) or for "failure of the pleading to state a claim upon which relief can be granted" (Fed. R. Civ. P. 12(b)(6)).[19] However, the district court permitted respondents' suit to go forward and subjected the post-1973 petitioners to the burdens of litigation based almost entirely upon conclusory allegations about a continuing conspiracy. For nearly one year after the filing of the motion for summary judgment, respondents had the opportunity to take discovery and to gather information implicating the post-1973 petitioners. At the end of that period, they still had not adduced a shred of proof but relied instead upon an affidavit of counsel requesting still more time to take still more discovery.

The district court granted summary judgment based upon three findings, none of which was disputed by the

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[19] This case is therefore similar to *Velde* v. *National Black Police Association*, No. 80-1074 (argued Dec. 9, 1981), another *Bivens* action seeking substantial compensatory and punitive damages from federal officials. In *Velde*, we argued (Pet. Br. 28-39) that the complaint should have been dismissed because it lacked any specific factual allegations linking the defendants with the alleged illegality —discrimination on the basis of race and gender by local government agencies receiving federal funds.

court of appeals. Both courts agreed that respondents' amended complaint lacked specific allegations against the post-1973 petitioners (App. A, *infra*, 6a, 9a-10a; App. H, *infra*, 130a). Both courts agreed that those petitioners had properly supported their motion with affidavits evidencing their lack of involvement in the actions upon which respondents' amended complaint was based and that their affidavits were substantiated by the fact that they had taken office after almost all of the events alleged in the complaint had occurred (App. A, *infra*, 70a; App. H, *infra*, 130a).[20] Both courts agreed that respondents had not opposed the post-1973 petitioners' motion with an evidentiary submission of their own (App. A, *infra*, 71a; App. H, *infra*, 130a-131a).

The court of appeals reversed only because it felt that respondents should have been given more time before being required to come forward with any evidence supporting the general allegations in their complaint. In our view, that decision reversing the trial judge on a matter peculiarly within his competence—the timing of discovery—was wholly unjustified, especially in a *Bivens* suit.

The court of appeals noted that discovery was still in its first "wave" (App. A, *infra*, 72a), during which the parties had agreed to serve interrogatories and make document requests, and had not yet entered the "second wave," during which depositions would be taken (*id.* at 9a). But if the court of appeals had been as familiar with the discovery proceedings as the trial court, whose

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[20] The court of appeals stated that three of the post-1973 petitioners (Edward Levi, Benjamin Bailar and William Williams) "concede[d in their affidavits] that they participated in investigations of the Party" (App. A, *infra*, 73a). But the footnote summarizing the nature of these "concessions" (see *id.* at 70a n.187) substantiates the court's conclusion that "[t]here is no indication that their conduct was illegal" (*id.* at 73a). For example, the court pointed out that former Attorney General Levi decided to *terminate* the investigation of the Party "shortly after he took office" (*id.* at 70a n.187).

judgment it overruled, it undoubtedly would have realized that the parties' stipulation of November 15, 1977, concerning "wave" discovery did not apply to discovery required to resist summary judgment. When that stipulation was made, the post-1973 petitioners' motion for summary judgment had been pending since July 1977. Thus, it is implausible to suggest that respondents, aware of the outstanding summary judgment motion and realizing that they lacked any opposing proof, entered into a stipulation barring them from taking discovery needed to resist that motion, or that petitioners intended to postpone a ruling on their summary judgment motion until all "waves" of discovery could be completed.

The court of appeals also noted that "only three months" before summary judgment was entered respondents received documents requested in discovery and that just three days before summary judgment was granted respondents received "an entirely new batch of documents" (App. A, *infra*, 72a). However, at the time of the court of appeals' decision—approximately three years after summary judgment was granted—respondents still had not come forward with any proof obtained from any source to substantiate their claims against the post-1973 petitioners.

Finally, the court of appeals observed that respondents had filed a motion to compel discovery *after* summary judgment was entered (App. A, *infra*, 72a n.192). But the court did not explain why respondents had not pursued discovery more vigorously before summary judgment was granted. Nor did the court comment on the merits of respondents' motion to compel or provide any reason to believe that the granting of that motion would have produced evidence implicating the post-1973 petitioners.

Respondents' claims against the post-1973 petitioners were permitted to stand for more than a year simply on the strength of the complaint's general allegations concerning a continuing conspiracy and counsel's Rule 56(f)

affidavit requesting more time to take discovery. When, at the end of that period, respondents were still unable to come forward with any evidence to support their claims, summary judgment was properly entered. It may be a tenet of respondents' ideology that all persons holding certain offices must be part of a continuing conspiracy against them, but that belief is not a sufficient basis for maintaining a suit for damages in federal court.

2. The same erroneous approach to procedural problems in a *Bivens* action informed the court of appeals' decision concerning respondents' refusal to comply with discovery. As noted, the court of appeals held that respondents' disobedience of the trial judge's directives had been justified in some instances and that respondents had actually complied with the judge's order in all other respects. Not only was the court of appeals' decision wrong in its treatment of each of the discrete procedural questions involved, but its overall approach—a strained effort to justify or explain away respondents' repeated procedural dereliction—was precisely the opposite of what this Court prescribed in *Economou*.

a. *i.* A prime example of the court of appeals' improper approach is its decision that the district court erred in rejecting respondents' claims of privilege. Invoking the First Amendment, the Party refused to answer interrogatories that simply sought identification of likely witnesses—its leaders and those members whose names appear in pertinent documents. A litigant claiming an evidentiary privilege generally bears the burden of producing evidence establishing its applicablity. See, *e.g.*, *Weil* v. *Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 25 (9th Cir. 1981); *In re Grand Jury Empanelled Feb. 14, 1978*, 603 F.2d 469, 474 (3d Cir. 1979). When it is alleged, as in this case, that information is privileged under the First Amendment because disclosure would chill the exercise of the freedom of association, the litigant asserting the privilege bears the initial burden of establishing "a reasonable probabil-

ity that the compelled disclosure" would result in "threats, harassment, or reprisals from either Government officials or private parties" (*Buckley* v. *Valeo*, 424 U.S. 1, 74 (1976)). Only then does the burden shift to the party seeking disclosure to produce evidence of countervailing "interests sufficiently important to outweigh" the effect on First Amendment rights (*id.* at 66), as well as a " 'relevant correlation' or 'substantial relation' " between those interests and the information sought (*id.* at 64; footnotes omitted).

Here, respondents failed to discharge their initial burden of production. Although they had the opportunity to do so, they offered absolutely no evidence to support their conclusory assertion that the associational rights of Party members and leaders would be chilled by disclosure. (App. A, *infra*, 84a (MacKinnon, J., dissenting).[21] In contrast to respondents' mere assertion of privilege, the district court specifically found that the information sought by petitioners was "vital" to the preparation of their defense (App. G, *infra*, 125a, 128a). It reasoned that "the special character of this litigation, which involves a suit brought several years after the alleged events by plaintiffs who have lost or destroyed almost all the relevant documents," means that the persons whose identity the Party refused to reveal "may well be the individuals able to provide defendants with the information necessary for their defense—even to the point of telling them exactly what they are accused of doing" (App. F, *infra*, 119a-120a). Thus, as Judge MacKinnon's dissent concludes, the district court correctly

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[21] As Judge MacKinnon stated in dissent (App. A, *infra*, 84a), the limited nature of the information sought and the lack of any evidentiary support for respondents' claim of privilege made this case "a far cry from *NAACP* v. *Alabama*, 357 U.S. 449 (1958)." There, the First Amendment was held to protect the names of rank-and-file members because there had been an "uncontroverted showing" of past reprisals against persons associated with the organization. 357 U.S. at 462-463. The names of all directors and officers, however, were disclosed (*id.* at 465).

found that respondents' unsupported First Amendment claim was outweighed by petitioners' need for information vital to their defense (App. A, *infra*, 84a). As this Court has stated, even "[e]videntiary privileges * * * rooted in the Constitution must give way in proper circumstances." *Herbert* v. *Lando*, 441 U.S. 153, 175 (1979).

The court of appeals, however, shifted the initial burden of producing evidence from the respondents to the petitioners. The court stated (App. A, *infra*, 52a):

> The [district] court never specifically addressed the question whether the Party's fears of harassment and interference with First Amendment rights were substantial.

But the court of appeals did not explain how the district court could have "addressed the question" since respondents adduced no evidence substantiating their claims.[22]

The court of appeals went on to state (App. A, *infra*, 52a-53a; footnotes omitted):

> As for the other side of the balance, the [district] court simply accepted [petitioners'] claims that the undisclosed names were crucial, even though [petitioners] had never stated precisely what information they hoped the unnamed individuals would provide. The [district] court also failed to consider the possibility that alternative sources might be able to provide the information sought.

The court of appeals' analysis is wrong on three grounds. First, respondents' failure to satisfy their initial burden of producing evidence was alone a sufficient basis for rejecting their claim, and there was thus no need for the district court to consider "the other side of the balance." Absent a privilege, evidence must be disclosed in

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[22] In a footnote (App. A, *infra*, 52a n.153), the court of appeals suggested that the record supports respondents' claims, but the court referred, not to affidavits or evidence, but to allegations in the complaint.

civil discovery if it is "relevant" to any claim or defense or "appears reasonably calculated to lead to the discovery of admissible evidence" (Fed. R. Civ. P. 26(b)(1)). Second, the district court specifically found that petitioners had a "vital" need for the information in question (App. G, *infra*, 125a, 128a); indeed, that need was self-evident. Charged with participation in an unlawful conspiracy to destroy the Party, petitioners plainly needed to ascertain the identities of Party leaders and certain members, both to locate potential witnesses and to establish that what respondents had characterized as an unlawful conspiracy was actually a legitimate investigation of persons engaged in criminal activity (see App. A, *infra*, 86a (MacKinnon, J., dissenting)). Third, the suggestion that petitioners might have obtained the information required from "alternative sources," while plausible in the abstract, was obviously unsatisfactory here. The "alternative sources" to which petitioners would be relegated were those Party officers and members whom respondents chose to regard as "known to the public" (*id.* at 42a).[23] The court of appeals simply ignored the distinct possibility that respondents would disclose the identities of only those persons whose past activities or likely testimony would not substantiate petitioners' defense.[24]

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[23] It is not clear what is meant by the term "known to the public" (App. A, *infra*, 42a). Nor is it clear how petitioners could contest respondents' classification of particular individuals. Petitioners would be placed in the absurd position of proving that Party leaders and members whose identities they did not know were "known to the public." Conflicting answers concerning the classification of individuals had already been received from respondents (see note 13, *supra*). Thus, permitting respondents to withhold disclosure of the identities of persons not "known to the public" would, in practice, have left respondents free to choose which individuals to reveal.

[24] The majority opinion frequently suggests that petitioners can overcome the numerous shortcomings in respondents' answers to interrogatories by deposing Party officers "at a later stage of discovery" (see App. A, *infra*, 28a n.98, 30a, 53a, 54a). It is obvious, however, that before petitioners can depose Party officers they must first be told who those officers are.

ii. The district court also properly rejected Newton's refusal on Fifth Amendment grounds to provide information about the very matters he had placed in issue in the complaint.[25] The district court correctly concluded that if Newton "wishes to continue to press claims relating to the[] interrogatories," he must in fairness "tell [petitioners] what exactly they are accused of doing" (App. G, *infra*, 128a).

The court of appeals reversed this determination as well, finding that the district court had not undertaken "the careful analysis" required in balancing Newton's Fifth Amendment rights against petitioners' need for the information (App. A, *infra*, 61a). The court of appeals failed, however, to explain how Newton's interest in preventing disclosure could possibly prevail in a case such as this. Here, part, if not the essence, of Newton's claim is that actions undertaken by petitioners ostensibly for law enforcement purposes were actually done to destroy the Party for political reasons. In order to defend against such charges, petitioners needed information showing that Newton and other members of the Party merited criminal investigation.

The court of appeals suggested that the trial judge should have considered "whether [to enter] an order delaying Newton's obligation to respond until the danger of criminal prosecution has passed" (App. A, *infra*, 63a). However, in light of statutes of limitations applicable to some of the offenses under which Newton might claim

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[25] Newton's claim of Fifth Amendment privilege was largely frivolous on its face. For example, he claimed the privilege to avoid disclosing the identities of witnesses because *they* were allegedly under criminal investigation; he claimed the privilege to avoid disclosing information relevant to his tax audit (a matter specifically put in issue by the complaint) even though the IRS had indicated that he would not be prosecuted; and he claimed the privilege to avoid disclosing information about which he himself had testified in earlier proceedings (C.A. App. 240-250).

a risk of prosecution,[26] it is not apparent that the moment would come within petitioners' lifetimes when Newton could not contend, with as much justification as he has now, that the information sought might "*possibly* have [a] tendency * * * to incriminate" him (*Hoffman* v. *United States*, 341 U.S. 479, 488 (1951) (emphasis in original)). The court of appeals also suggested that the district court "might consider * * * dismissing only that portion of Newton's suit that relates to the withheld information" (App. A, *infra*, 64a). But Newton himself alleged that the incidents mentioned in the complaint were interconnected parts of a conspiracy against him, and it stands to reason that the events concerning which Newton refused to supply information on the ground that it might tend to incriminate him are those most likely to show that petitioners acted reasonably in their investigations and that it was respondents, not petitioners, who were engaged in a continuing criminal conspiracy.

b. The court of appeals took the same mistaken approach in holding that the district court erred in requiring individual responses by Party officers to those interrogatories that the Party's designated representative had been unable to answer satisfactorily. The court of appeals reached that conclusion based upon a hypertechnical and plainly incorrect construction of Rule 37, Fed. R. Civ. P. In the court's view, an order requiring individual responses by Party officers could not be entered in response to petitioners' motion to compel under Rule 37(a). Such an order, the court held, could be entered only if the Party's designated representative failed to provide

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[26] Interrogatories 46, 47, and 48 relate to a murder in California, an offense for which there is no statute of limitations (Cal. Penal Code § 799 (West 1970)). In addition, the five-year federal statute of limitations (18 U.S.C. 3282) for conspiracy (18 U.S.C. 371) runs from the occurrence of the last overt act. *Grunewald* v. *United States*, 353 U.S. 391, 396-397 (1957). Thus, provided that one overt act occurred during the five-year period, earlier acts may be proved.

adequate answers despite the issuance of an order compelling her to do so (App. A, *infra*, 28a). At that point, the court stated, petitioners could move for the imposition of sanctions under Rule 37(b) and the court could order individual responses—but would be justified in doing so only under "rare" circumstances (*id.* at 28a & n.99).

There is no precedent for the court of appeals' construction of Rule 37, and it finds no support in the language of the Rule itself. When a party serves "evasive or incomplete" answers to interrogatories (Fed. R. Civ. P. 37(a)(3)), Rule 37(a)(2) provides that the opposing party "may move for an order compelling an answer." As Judge MacKinnon pointed out in dissent, "[t]he rule does not limit what the order may provide" (App. A, *infra*, 81a). While Rule 37(a) does not expressly authorize an order compelling individual responses, neither does Rule 37(b), under which the court of appeals felt such a directive could be issued. Moreover, Rule 37(b) concerns the imposition of *sanctions*, such as contempt or dismissal of the action, and the purpose of such measures is not to further discovery but to punish and to defer future violations. Compelling individual responses by party officers is not a sanction or punishment but a method of ensuring adequate discovery in the case at hand—the very purpose of a Rule 37(a) order to compel.

The court of appeals' holding exalts form over substance in a manner reminiscent of an earlier era of civil procedure. Under the court's interpretation of Rule 37, an organization's designated representative must be given two attempts to furnish adequate answers before individual responses may be ordered: one chance after the interrogatories are served and another after an order to compel is disobeyed. Here, the Party's designated representative had *three* chances. On the first chance—after the interrogatories were propounded—she furnished no answers whatsoever within the time required. On the second—after petitioners' first motion for the imposition

of sanctions—the Party's initial designee supplied inadequate answers. On the third—after the issuance of the order to compel—the Party's second designee furnished inadequate supplemental answers.

c. The final example of the court of appeals' mistaken approach is in some respects the most revealing. It concerns the district court's finding that the Party disobeyed its order to clarify inconsistent interrogatory answers (App. F, *infra*, 118a). In reversing that finding as "clearly erroneous," the court of appeals did not discuss each of the disputed interrogatory answers but merely offered four "examples" in an attempt to show that respondents' answers were not deficient (App. A, *infra*, 36a-41a). In each example, the court cited, not respondents' interrogatory answers, but legal memoranda of counsel totally lacking in evidentiary value (see *id.* at 38a nn.122, 124; 40a nn.129, 131; 41a n.134). We are aware of no other case, let alone a *Bivens* suit, in which a court of appeals has, in effect, constructed interrogatory answers on behalf of a party that failed to provide such answers itself.

d. Not only was the court of appeals wrong in concluding that respondents had not unjustifiably disobeyed the district court's order compelling discovery, but the district court acted well within the scope of its discretion in deciding that dismissal was the sanction required. Even in non-*Bivens* cases, "Rule 37 sanctions must be applied diligently." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 763 (1980). In view of the Court's admonitions in *Economou*, particular deference is due a district court's judgment that dismissal is the appropriate sanction in a *Bivens* action.

Here, the trial judge concluded that respondents' "conscious disregard" of its order compelling discovery justified such a measure (App. F, *infra*, 121a). The trial judge applied the correct legal standard to a question committed to his sound discretion (*id.* at 122a). See *National Hockey League* v. *Metropolitan Hockey Club*, 427

U.S. 639, 642-643 (1976). His proper exercise of discretion should not have been reversed.

3. In sum, the decision of the court of appeals constitutes a broad assault on the ability of a district court to manage a large and complex *Bivens* action. By second-guessing the trial court's judgments as to what steps were needed to "take charge" (C.A. App. 626) of a case that had degenerated into "chaos" (*ibid.*) and by forgiving or attempting to explain away all of respondents' procedural violations, the court of appeals departed drastically from the approach mandated by *Economou*. As a result, two dozen former high-ranking federal officials must once again defend against a harassing lawsuit that has been pending for more than five years.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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